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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5344

LORENZO WILLIS, A MINOR, BY WILLIE WILBON, NEXT FRIEND,

Petitioner,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia whose decision is under review here is reported as *Prudential Insurance Company of America v. Willis*, 227 Ga. 619, 182 S.E.2d 420, decided May 20, 1971 (A. 113). This decision reversed the decision of the Court of Appeals of Georgia in the same case reported as *Prudential Insurance Company of*

America v. Willis, 123 Ga. App. 150, 179 S.E.2d 688, decided November 30, 1970 (A. 95). The opinion and judgment of Elbert Superior Court, the trial court below, is unreported (A. 90).

JURISDICTION

The opinion and judgment of the Supreme Court of Georgia, the highest court in the state in which a decision could be had, was rendered May 20, 1971. The petition for certiorari was filed June 10, 1971, and certiorari was granted November 9, 1971. Jurisdiction is invoked under 28 U.S.C.A. 1257(3), petitioner having specially set up and claimed certain titles, rights and privileges under the Constitution and laws of the United States, to wit, 79 Stat. 883, 38 U.S.C.A. 770, and the due process clause of the Fifth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Constitution of the United States, Amendment V:

> ". . . [N]or shall any person . . . be deprived of life, liberty or property, without due process of law."

(2) Constitution of the United States, Amendment XIV, Section 1:

> ". . . [N]or shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(3) Servicemen's Life Insurance Act of 1965, 79 Stat. 883, 38 U.S.C.A. 770(a):

> "(a) Any amount of insurance under this subchapter in force on any member or former member on the date of his death shall be paid, upon the establishment of a valid claim therefor, to the person or per-

sons surviving at the date of his death, in the following order or precedence:

"First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received in the uniformed services prior to such death;

"Second, if there be no such beneficiary, to the widow or widower of such member or former member;

"Third, if none of the above, to the child or children of such member or former member and descendants of deceased children by representation;

"Fourth, if none of the above, to the parents of such member or former member or the survivor of them;

"Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such member or former member;

"Sixth, if none of the above, to other next of kin of such member or former member entitled under the laws of domicile of such member or former member at the time of his death."

QUESTIONS PRESENTED

(1) Whether the Supreme Court of Georgia was correct in construing the beneficiary clause of the Serviceman's Life Insurance Act, 79 Stat. 883, 38 U.S.C.A. 770(a) (Third), declaring that the policy proceeds thereunder shall in certain instances be paid to the "child or children of such (serviceman) . . . ," as excluding acknowledged illegitimate children of a deceased serviceman.

(2) Whether the Supreme Court of Georgia was correct in holding that the meaning of the words "child or children" as used in the beneficiary clause of said statute should be construed according to the laws of Georgia rather than according to federal principles involving the purpose and intent of Congress in the enactment of said statute.

(3) Whether the interpretation placed upon said statute by the Supreme Court of Georgia denies to petitioner, a Negro, the equal protection and due process of law guaranteed by the Fourteenth Amendment, and the due process of law guaranteed by the Fifth Amendment, in that the classification thus made between legitimate and illegitimate children (a) Is without any reasonable basis in fact to the purpose of Congress in providing a substitute source of income for the persons legally dependent upon a deceased serviceman, and (b) Unconstitutionally discriminates against petitioner's class, with respect to whom the incidence of illegitimacy is much higher than the national average due to a history of slavery and discrimination.

STATEMENT

Relying upon Georgia law governing intestate succession, the Supreme Court of Georgia has held in this case that when Congress provided in the beneficiary clause of the Serviceman's Life Insurance Act, 79 Stat. 883, 38 U.S.C.A. 770(a), that the insurance benefits thereunder provided would be paid to the "child or children of such member . . ." in certain instances, that Congress intended to limit these benefits to legitimate children of the deceased serviceman, and to exclude his illegitimate children.

Lorenzo Willis, petitioner herein, is the three-year-old illegitimate Negro son of a 15-year-old mother (A. 43) and a 20-year-old deceased serviceman (A. 64) who was killed in Viet Nam on September 19, 1968 (A. 4, 12). This action was brought on behalf of the minor petitioner in the name of his maternal grandmother, to recover the $10,000 proceeds of an insurance policy issued upon the life of the deceased pursuant to the Serviceman's Life Insurance Act of 1965, 79 Stat. 883, 38 U.S.C.A. 770(a).

Prior to his death, deceased acknowledged petitioner as his son (A. 57, 58, 60, 65), and he has been so recognized by the Social Security Administration and the Veterans Admin-

istration (A. 59). Following the death of deceased in action, his father offered to assist in securing benefits for the child and papers were turned over to him for that purpose, but instead of securing the benefits for his grandson, the grandfather obtained them for himself (A. 66, 82-3). Deceased left no widow surviving, and had not, prior to his death, designated a named beneficiary in writing to receive the policy proceeds which, under the statute, required that they devolve in accordance with the priorities specified in the statute (A. 15).

Following the filing of this action, Requests for Admissions were served (A. 17), depositions were taken (A. 40-87), and both parties moved for summary judgment (A. 25, 37). The trial court entered order on July 14, 1970, granting the motion of petitioner and denying the motion of respondent (A. 90). Respondent appealed to the Court of Appeals of Georgia, and that Court affirmed on November 30, 1970 (A. 95). *Prudential Ins. Co. of America v. Willis*, 123 Ga. App. 150, 179 S.E.2d 688 (1971). The Court of Appeals gave recognition to the fact that this being a federal statute, it was to be construed according to federal principles, and declared: "We do not believe that Congress intended an administration on this law varying from State to State. The legislative history of the law indicates that the purpose of the same was geared to assuring support for dependents rather than passing on accumulated wealth to relatives according to local laws of inheritance as has been ruled by our Georgia courts." 123 Ga. App. at 155-6 (A. 101).

The Supreme Court of Georgia granted certiorari, and on May 20, 1971, reversed the decision of the Court of Appeals (A. 113), without discussion, relying upon its prior decision in *Dobyns v. Prudential Ins. Co. v. America*, 227 Ga. 253, 179 S.E.2d 915, decided January 29, 1971. *Dobyns* in turn relied upon the decision in *Cooper v. Melvin*, 223 Ga. 239, 154 S.E.2d 373 (1967), construing similar language in the Federal Employees Group Life Insurance Act (now 5 U.S.C.A. 8705 *et seq.*). In the Cooper case, the Supreme

Court of Georgia ignored entirely the fact that it was interpreting a federal statute, and resolved the question according to Georgia inheritance and property law concepts.

Justice Felton, with Justice Hawes, dissented, declaring that under decisions of this Court, the question was controlled by federal law, and that Congress did not intend to exclude illegitimate children from taking on an equal basis with legitimate children.

This Court granted certiorari and leave to proceed in forma pauperis on November 9, 1971.

SUMMARY OF ARGUMENT

(1) The Supreme Court of Georgia erred in construing the words "child or children" in the beneficiary clause of the Serviceman's Life Insurance Act, 38 U.S.C.A. 770(a) (Third), according to Georgia laws governing such terms when used in the intestacy statute, wills and state wrongful death statute. Instead, that court should have recognized that this being a federal statute rather than an ordinary policy of insurance, a federal principle should be articulated to govern interpretation. The relationship between a serviceman and the United States has been characterized by this Court as being "distinctively federal in character," and in all cases dealing with the rights of servicemen, this Court resolved the questions according to federal principles, disregarding state law entirely. The decision in *DeSylva v. Ballentine*, 351 U.S. 570 (1956), holding that Congress intended to refer to state law in the Copyright Act, is not applicable here. In that case, the Court did not hold that Congress intended to refer to state law under all federal statutes, but only under the one there in issue. The Copyright Act was concerned only with the creation and protection of a right so as to encourage literacy achievement. What happened at death was immaterial to the Congressional policy, and devolution at death was really a question of the descent of property. In the Serviceman's Life Insurance Act, however,

the entire Congressional purpose is concerned with what happens upon death. To refer to state law in such a case would frustrate the Congressional policy, and create diversity of result in an area where uniformity is highly desirable.

(2) Properly construed, the words "child or children" in the statute in question should be construed as including illegitimate children as well as legitimate children. The obvious purpose of the statute was to provide a substitute source of income for those persons likely dependent upon the deceased, and construing the statute in light of this purpose requires that illegitimates be included, for they are equally dependent upon the father as a legitimate child. Under Georgia law, a father is required to support his illegitimate children. The rule that illegitimate children could not inherit arose at a time when the law was overly-concerned with protecting the stability of land titles. Such a concern has no relevance in a social welfare type statute which is designed to promote humane objectives devoid of such considerations.

(3) Excluding illegitimates from taking under the statute gives rise to a classification unsupported by any compelling state interest, and one which does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation. Such a classification would render the statute unconstitutional under either the rational connection or compelling state interest test. Regardless of whether insurance is such a right as to be subject to the "compelling state interest" test, the basis of the classification itself, i.e., status of one's birth, clearly requires application of this test. *Labine v. Vincent*, 401 U.S. 532 (1971), is distinguishable. Intestate succession deals with a subject matter which can support such a discrimination, but the purpose of the Serviceman's Life Insurance Act, i.e., to provide a substitute source of income for dependents, has no relevancy to legitimacy or illegitimacy. The desire to strengthen family life, relied on in *Labine*, is not pertinent here for the foregoing reason, and for the additional reason that Georgia law

expressly recognizes and enforces the obligation of the father to support his illegitimate children. Neither can the discrimination be upheld as a means of discouraging promiscuity, as this penalizes a helpless child for the conduct of his parents over which he has no control, and this objective can be better achieved by less sweeping means which do not impinge upon the rights of innocent persons.

(4) The exclusion of illegitimates also violates due process and equal protection because it effectuates an additional discrimination against Negroes. The rate of illegitimacy among the non-white population is much greater than among the white, being in excess of 8 to 1 in Georgia, and this difference is traceable to the continuing effects of the institution of Negro slavery and state-enforced discrimination.

ARGUMENT

I. THE SUPREME COURT OF GEORGIA ERRED IN CONSTRUING THE SERVICEMAN'S LIFE INSURANCE ACT ACCORDING TO STATE LAW RULES.

The *per curiam* opinion rendered by the Supreme Court of Georgia declares merely that the case is controlled by *Dobyns v. Prudential Ins. Co.*, 227 Ga. 253, 179 S.E.2d 915, *Cooper v. Melvin*, 223 Ga. 239, 154 S.E.2d 373, and *Foster v. Cheek*, 212 Ga. 821, 96 S.E.2d 545. The *Dobyns* case involved the same statute in question here, and in that case, the Court's opinion did not enter into any discussion of the problem, but relied merely upon the *Cooper* case, declaring:

> "1. Under the full bench decision of this court in Cooper v. Melvin, 223 Ga. 239 (154 S.E.2d 373), construing the identical language of the Federal Employees' Group Life Insurance Act of 1954 (50 U.S.C.A. § 3085) the language in 38 U.S.C.A. § 770 providing for the payment of Servicemen's Group Life Insurance benefits in the event the serviceman fails to designate a beneficiary must be construed as not including an illegitimate, though acknowledged,

child of a serviceman where the child has not been made legitimate by one of the methods provided by law. See Code §§74-101, 74-103." (227 Ga. at 254).

In the *Cooper* case, involving the Federal Employees Group Life Insurance Act, the Georgia Supreme Court approached the problem by declaring that "[W]e must therefore look to the *laws in this State* relating to illegitimate children to determine whether they are included in the term 'children' used in the *policy*," citing *Foster v. Cheek, supra.* The Court then referred to the fact that only legitimate children had been held to be included in the term "children" when used in deeds, wills, inheritance, and wrongful death statutes and the like, and concluded: "In view of the statutes and decisions of this court defining the word 'children,' and the policy of our law as to inheritance by illegitimate children, we must hold that the word 'children' in the insurance policy of the putative father of the illegitimate children did not entitle them to share in the proceeds of the policy, and it was error to direct a verdict finding them entitled to a share of the proceeds, and to order the disbursement of one-half of the proceeds of the policy to them." *Cooper v. Melvin*, 223 Ga. at 242.

In *Foster v. Cheek, supra*, also involving the Federal Employees' Life Insurance Act, the question was whether an adopted child would be included within the statutory language. In resolving the question, the Georgia Court recognized that it was construing a federal statute, and declared, "There being no federal law of domestic relations, which is primarily a matter of State concern (*DeSylva v. Ballentine*, 351 U.S. 570, 76 Sup. Ct. 974, 100 L.Ed. 1415), we must look to the law of this State in order to determine whether or not the defendant in error in the instant case occupies the position of a "child" under the provisions of the act above referred to and the policy of insurance involved." 212 Ga. at 827. Turning to Georgia law governing adopted children, the Court held that an adopted child would be entitled to take under the language of the act and policy in question.

It is therefore not subject to dispute that the Supreme Court of Georgia in this case interpreted the language of the federal statute according to state law rules rather than undertaking to discover a federal rule to govern the question.

In so doing, the Supreme Court of Georgia disregarded entirely the fact that this being a federal statute, it should be interpreted according to federal principles and not state law. *Calhoun Gold Mining Co. v. Ajax Gold Mining Company*, 182 U.S. 499, 505 (1901); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943); Constitution of the United States, Art. VI, Cl. 2. Also disregarded was the recognition that "Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces," and one to be "governed by federal authority." *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947). In several cases, this Court has resolved questions concerning servicemen according to federal principles in a manner directly contrary to what would have been required under state law. See *Wissner v. Wissner*, 338 U.S. 655 (1950), holding that insurance proceeds under the National Service Life Insurance Act of 1940 would devolve according to federal law rather than the California Community property law; *Woodward v. United States*, 341 U.S. 112 (1951), holding that an adopted brother was included within the words "brother" as used in the same act, without any reference to state law being made; *United States v. Zazove*, 334 U.S. 602, 610 (1948), holding that the statutory provisions governing the NSLI Act of 1940, "are to be construed liberally to effectuate the beneficial purposes that Congress had in mind"; *United States v. Oregon*, 366 U.S. 643, 648-9 (1961), holding that the estate of a veteran dying in a V.A. Hospital would devolve according to federal law rather than the state law of domicile.

The Supreme Court of Georgia also cited *DeSylva v. Ballentine*, 351 U.S. 570 (1956) for the proposition that with respect to questions of familial relationships, Con-

gress usually refers to state law concepts, there being no federal law of domestic relations. 351 U.S. at 580, with Mr. Justice Douglas and Mr. Justice Black concurring in the result but dissenting on the question of reference to state law. However, *DeSylva* does not hold that Congress so intends in *every* statute, but only that Congress did so in the statute in question. The *DeSylva* case involved the title to renewal rights under the Copyright Act, and as this Court noted, "This is really a question of the descent of property . . .", 351 U.S. at 582, and since New York law permitted inheritance by an illegitimate, the illegitimate daughter was held entitled to share in the renewal rights. In the *DeSylva* case, Congress was concerned only with the *creation* and protection of a right so as to encourage literary and artistic achievement. These purposes are not affected by what happens upon the death of the author. Consequently, devolution upon death could be in accordance with state law without affecting the Congressional purpose. In the present Act, however, the entire congressional purpose is concerned with *what happens upon death*, and unless one uniform rule is applied, the purpose of Congress would be frustrated.

The Court of Appeals for the Third Circuit has held that *DeSylva* doew not apply in a case like the present on the reasoning that "For however appropriate it may be to follow state laws of inheritance where the problem is essentially one of passing accumulated wealth to succeeding generations, *we think it reasonable to infer here that Congress intended the distribution of proceeds of term insurance to provide a substitute source of income for that lost by the insured's death.* Therefore, the *DeSylva* case which involved a different act with different purposes does not control the resolution of the present problem of statutory construction." *Metropolitan Life Ins. Co. v. Thompson*, 368 F.2d 791 (C.A. 3rd 1966), cert. den., 388 U.S. 914.

In addition, where Congress intended to refer a question to state law in the present act, it expressly so declared, for

in paragraph 6 of the same statute, Congress included the following as a final catchall:

> "Sixth, if none of the above, to other next of kin of such member or former member entitled under the laws of domicile of such member or former member at the time of his death".

There is no such express reference in the third paragraph, which is involved here. Hence, *expressio unius est exclusio alterius.*

Moreover, in a subject which this Court has characterized as "distinctively federal", *United States v. Standard Oil Company, supra,* reference to state law would produce a contrariety of result in an area where national uniformity is desirable.

The pressing need for uniformity in matters affecting servicemen is by itself a sufficient reason for requiring the application of a federal rule, rather than referring the matter to state law concepts, for generally, Congress intends that its laws shall operate uniformily throughout the nation so that the federal program will remain unimpaired. *Reconstruction Finance Corp. v. County of Beaver,* 328 U.S. 204, 209 (1946).

Therefore, it is submitted that the Supreme Court of Georgia erred in resolving the question according to Georgia laws governing intestacy, wills, wrongful death and the like.

II. CONGRESS DID NOT INTEND TO EXCLUDE ILLEGITIMATE CHILDREN OF A DECEASED SERVICEMAN FROM BENEFITS UNDER THE SERVICEMAN'S LIFE INSURANCE ACT.

To begin with, the words of the statute, 38 U.S.C.A. 770(a) (Third), are unequivocal. They are "child or children or such member . . ." The statute does not say "legitimate children". A child is a child whether he is legitimate or illegitimate. "We start with the premise that illegitimate children are not 'non persons.' They are humans, live and

have their being." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

Secondly, such a construction does not comport with the obvious Congressional purpose. The words of a statute should be read "not in a vacuum, but in the light of the policies [it] was intended to serve." *Pennsylvania Railroad Co. v. Rychlik*, 352 U.S. 480, 488 (1957); *Hagger Company v. Helvering*, 308 U.S. 389, 394 (1940). "There is a presumption against a construction which would render a statute ineffective or insufficient, or which would cause grave public injury or even inconvenience." *Bird v. United States*, 187 U.S. 118, 124, (1902). "We are therefore bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." *Knowlton v. Moore*, 178 U.S. 41, 77 (1900).

It would be a perversion of reason to impute to Congress an intent to write into this humane legislation the cruel, antiquated, 16th Century notions of morality, as described by Blackstone,[1] which treated bastards as outcasts of society.

The rule disfavoring illegitimate children arose centuries ago in part from a desire to preserve stability in land titles. *Strahan v. Strahan*, 304 F. Supp. 40 (D.C. La. 1969), and

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[1] "I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody; and sometimes called filius nullius (the son of no one), sometimes filius populi (the son of the people). * * * The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being nullius filius, he is therefore kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church." *Blackstone's Commentaries Book I*, p. 458-9.

see note, "Equal Protection and the Applicability of Levy v. Louisiana to Succession Law", 44 Tul. L.R. 640, 643 (1970).

In the enactment of the Serviceman's Life Insurance Act, Congress legislated at a different time and under different circmustances devoid of such considerations. As observed by Mr. Justice Holmes,

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

And, as one of the great scholars of the law expressed it almost 30 years ago, "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Cook, The Logical and Legal Basis of Conflict of Laws, 159 (1942).

The proposition urged here proves itself even under Georgia law, for although the word "children" in the intestacy statute, Ga. Code §113-903(3), had been held to mean legitimate children only, *Savage v. Blanks*, 117 Ga. App. 316 (1), 160 S.E.2d 461 (1968), would it be contended that the word bears the same meaning when used in the child molestation statute, Ga. Code §26-2019, or the "enticing" statute, Ga. Code §26-2020? Such an interpretation would render illegitimate children not only *nullius filius*, as referred to in *Blackstone's Commentaries, supra*, at pp. 458-9, but also relegate them to the realm of *caput lupinum*.

Conceding that the legislative history is not very illuminating, see U.S. Code Cong. & Adm. News 3232, 89th Cong., First Sess., (1965), Congress obviously intended in the Act to provide a substitute source of income for the persons dependent upon a serviceman. Under Georgia law, a father is equally obligated to support his illegitimate as

well as his legitimate children. Ga. Code, Sections 74-202, 74-9902.

Construing similar language in the National Service Life Insurance Act of 1940, 55 Stat. 846, the Court of Appeals for the District of Columbia declared:

> "The provision for gratuitous insurance was generous legislation, plainly adopted for humane and patriotic reasons. Neither its language, its legislative history, nor its explanatory clause, persuades us that Congress wished to exclude from its benefits the child of a soldier who was not married to the child's mother. Since the child is not at fault there is no reason to penalize him. We are not persuaded that Congress thought otherwise. We agree with the District Court that we should not interpolate the word "legitimate" before the word "child". *United States v. Phillipine National Bank*, 292 F.2d 743, 745 (C.A.D.C. 1961).

A like result has been reached in other decisions construing comparable language of the Federal Employees Group Life Insurance Act. See *Metropolitan Life Ins. Co. v. Thompson* 368 F.2d 791 (C.A. 3rd 1966), cert. den. 388 U.S. 914; *Metropolitan Life Ins. Co. v. Buckley, et al.*, 278 F. Supp. 334 (D.C. Miss. 1967); *Kimble v. United States*, 345 F.2d 951, 953 (C.A.D.C. 1965); *State v. Russell*, 68 Wash. 2d 748, 415 P.2d 503 (1966); *Haley v. Metropolitan Life Ins. Co.*, 434 S.W. 2d 7 (No. 1968), and compare *Armijo v. Wesselius*, 73 Wash. 2d 716, 440 P.2d 741 (1968), upholding wrongful death recovery; *Re Woodward's Estate*, 230 Cal. App. 2d 113, 40 Cal. Rptr. 781, 12 ALR 3rd 1134 (1964), upholding family allowance award; and *Herbert v. Petroleum Pipe Inspectors, Inc.*, 396 F.2d 237 (C.A. 5th 1968), upholding recovery under the Jones Act, 46 U.S.C.A. 688, on the basis of *Levy v. Louisiana, supra;* and see generally, annotation, 38 ALR 3d 613.

A district court in Maryland has recently construed the act in question here as including illegitimates using the same

reasoning urged here. See *Manning v. Prudential Ins. Co. of America*, 330 F. Supp. 1198 (D.C. Md. 1971), where the Court declared:

> "The case of Yellow Cab Co. v. Industrial Comm. 247 N.E.2d 601 (Ill. 1969), is instructive in this regard. In that case, the sole question to be determined was whether an illegitimate child could recover under the Illinois Workmen's Compensation Act. In broadening the ancient definition of 'child' to include illegitimate children, the court, relying, inter alia, upon the statutory duty of a father to support an illegitimate child, stated: '[T]he harsh doctrines of the common law relating to the rights of illegitimate children, and the underlying social attitudes which produced these doctrines have yielded to more enlightened judicial and legislative action.' 247 N.E.2d 601, 603. We agree."

In *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326, 329 (C.A. 2d 1934), in upholding recovery under the federal death act, the Court declared:

> "Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view. The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those whom might otherwise become dependent. The rule that a bastard is nullius filius applies only in cases of inheritance. Even in that situation we have made very considerable advances toward giving illegitimates the right of capacity to inherit by admitting them to possess inheritable blood."

Of course, other courts have reached a different result. See *LaBove v. Metropolitan Life Ins. Co.*, 264 F.2d 233 (C.A. 3rd 1959); *Grove v. Metropolitan Life Ins. Co.*, 271 F.2d 918 (C.A. 4th 1959); *Barker v. Metropolitan Life Ins. Co.*, 184 F. Supp. 159 (D.C.N.C. 1960); *Tatum v. Tatum*, 241 F.2d 401, 405 (C.A. 9th 1957); *Brantley v. Skeens*, 266 F. Supp. 447 (D.C.D.C. 1959); *Metropolitan Life Ins. Co. v. Fletcher*, Civil Action No. 67-131, July 28, 1967, N.D. Ala., unreported.

The *LaBove* case, however, is clearly distinguishable, for there the question was whether an adopted child could take the proceeds of a policy *on his natural father*. To permit recovery in this case would directly conflict with a valid state concern, which was the desire that an adopted child be completely isolated from his natural father so that he might thereby assume a normal place in his adoptive family. In other words, recovery was denied not because of illegitimacy, but because one parental relationship had been destroyed so that another might be furthered, and the same result would have followed regardless of illegitimacy.

There are numerous federal statutes providing benefits of varying types to the "child" or "children", and very few of these undertake to specify whether the reference is to legitimate or illegitimate children. Note, "Illegitimacy: Definition of Children Under Federal Welfare Legislation," 67 Col. L.R. 984 (1967). As one commentator observed:

> "Thus the federal attitude toward the inclusion of illegitimates within the class of children who are eligible to receive benefits under welfare laws consists of a mixture of deferance to state policy in the field of family relations, habit rooted in a long continued common law and social discrimination against the illegitimate, and concern about the problem of proof of paternity. On balance, however, the federal welfare laws have gone far toward eliminating discrimination against the illegitimate, the longest step having been taken in the 1965 amendment to the

Social Security Act." Krause, "Equal Protection For the Illegitimate," 65 Mich. L.R. 477, 482 (1967).

Secondly, it would seem that in the context of any statute dealing with a matter of social welfare, the word "children should be held to include illegitimates, for they are more likely to be in need than legitimate children. Note, "The Rights of Illegitimates Under Federal Statutes," 76 Harv. L.R. 337, 338 (1962).

Lastly, regardless of the primary concern of the legislation, i.e., even assuming the purpose was to pass on accumulated wealth, *where Congress comes to stating preferences itself*, the legislation should be construed by the courts in such manner as to benefit those persons most likely dependent upon the deceased for support. Note, "Illegitimacy: Definition of Children Under Federal Welfare Legislation," 67 Col. L.R. 984, 989 (1967).

For all of the foregoing reasons, it is submitted that as used in the Serviceman's Life Insurance Act, the words "child or children" should be construed as including illegitimate as well as legitimate children.

III. DISCRIMINATION AGAINST ILLEGITIMATES UNDER THE SERVICEMAN'S LIFE INSURANCE ACT WOULD BE UNCONSTITUTIONAL AS AN UNREASONABLE CLASSIFICATION.

In the preceding division of the argument, petitioner has endeavored to demonstrate that as a matter of statutory interpretation, the words "child or children" as used in the Act, 38 U.S.C.A. 770(a), should be held to include illegitimate children.

In this division of the argument, petitioner will demonstrate that any different interpretation would effectuate an unconstitutional discrimination under the traditional rules governing classifications . . .[2] In the division of the argu-

[2]It would seem that both the due process clause of the Fifth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment are involved. While the statute here is federal,

ment which follows, petitioner will show that such an interpretation would also involve an unlawful classification of a racial nature.

Petitioner's complaint in this case specially set forth a constitutional claim (A. 5).

The traditional rules governing classifications have been often stated. Classification is permitted, but it "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Colgate v. Harvey*, 296 U.S. 404, 423 (1935). The classification must rest upon "some difference which bears a just and proper relation to the attempted classification." *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 560 (1902). The classification must "rest on real and feigned differences, that the distinction have some relevance to the purpose for which the classification is made . . ." *Walters v. St. Louis*, 347 U.S. 231, 237 (1954). In economic matters, at least, "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it". *McGowan v. Maryland*, 366 U.S. 420, 425-6 (1961).

The classification here, however, does not deal simply with a matter of economic regulation, but is one manifesting "prejudice against (a) discrete and insular minorit[y]" which tends to be "a special condition, seriously [curtailing] the operation of those political processes ordinarily

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and any resulting interpretation may be said to be attributable to federal action, the law actually applied, under a reference to state law such as found in *DeSylva v. Ballentine*, 351 U.S. 570 (1950), is nevertheless state law, for the result would vary from state to state, and the same federal statute might be legal in one state and unconstitutional in another. While the Fifth Amendment contains no equal protection clause, the due process clause in that amendment imposes essentially the same limitations upon the validity of classifications. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Company*, 304 U.S. 144, 153 (1938). While generally there is a presumption of constitutionality, and the burden of showing a classification void is upon the person attacking it, *Middleton v. Texas Power & Light Co.*, 349 U.S. 152, 157-8 (1918), in a case involving a classification of the type here shown, "There may be narrower scope for operation of the presumption of constitutionality . . . ," *United States v. Carolene Products Co., supra*, at p. 152, and the burden of justifying such a classification rests upon the state. *Loving v. Virginia*, 388 U.S. 1,9 (1967).

In this instance, a mere showing of rational relationship is not enough, and the classification cannot be upheld "unless shown to be necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

The Court has applied this stricter test in such matters as race, *McLaughlin v. Florida*, 379 U.S. 184, 191-2 (1964); ancestry, *Korematsu v. United States*, 323 U.S. 214, 216 (1944); voting, *Harper v. Board of Virginia Elections*, 383 U.S. 663, 670 (1966); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); education, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and see *Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952), applying the strict test to a classification based on alienage.

In determining whether the classification here should be subjected to the more rigorous test of constitutionality, it is immaterial whether insurance proceeds or other social welfare type benefits are to be deemed to impinge upon fundamental rights, for the basis of the classification itself, i.e., the status of one's birth, most certainly does. Gray and Rudovsky, "The Court Acknowledges The Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Company," 118 U. Pa. L.R. 1, 5 (1969). This distinction is borne out by *Shapiro v. Thompson*,

supra, for without deciding whether welfare benefits *per se* constituted a species of right entitled to the greater protection, the Court held that the basis of classification, i.e., the right of intestate travel, clearly was. See 394 U.S. at 634.

A classification based on legitimacy clearly serves no compelling governmental interest in the context of the present statute. As stated by two commentators on the subject:

> "Classifications based on status of birth are also similar to racial classifications in that illegitimate share with nonwhite Americans a history of widespread private discrimination reinforced and institutionalized by legal disabilities. They too are second class citizens in a society in which illegitimacy has been described as a 'psychic catastrophe'. Illegitimates suffer from psychological and social handicaps closely comparable to those which result from racial discrimination. In this context it is not surprising that legal discrimination against illegitimates tends to fall most harshly on blacks and the poor, and that in some instances this discrimination may have been designed with this specific end in mind.
>
> "Finally, like nonwhites, illegitimates constitute a class that is a "discrete and insular" minority peculiarly susceptible to prejudice which tends to 'curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . .' Indeed, the stigma of 'bastardy' in American society is so strong that illegitimates may be even more disabled than nonwhites from forming a political force to effect changes on a social or legislative level," Gray and Rudovsky, *supra* (118 U. Pa. L.R. at 6-7).

This problem is particularly acute as it affects persons of illegitimate birth. While most racial and religious minorities have no hesitancy in associating for the purpose of advancing their mutual interests, the very act of conceding illegitimacy evokes public opprobrium, and tends to exacerbate the very thing that the hapless victim is complaining about. Compare *National Association For The Advance-*

ment of Colored People v. Alabama, 357 U.S. 449, 459 (1958).

The defect in the classification here is not over or under-inclusiveness, but the reasonableness of the basis of the classification itself. Krause, "Equal Protection For The Illegitimate", 65 Mich. L.R. 477, 486 (1967). In *Levy v. Louisiana*, 391 U.S. 68 (1968), illegitimacy was held to be an invalid basis of classification with respect to wrongful death recovery for the loss of a mother, the Court declaring that: "We conclude that it is invidious to discriminate against them when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother" 391 U.S. at 72.

In *Labine v. Vincent*, 401 U.S. 532 (1971), the Court upheld a Louisiana statute which barred the illegitimate children from sharing equally with the legitimate children of a father who died intestate, declaring that, "[T]he choices reflected by the intestate succession statute are choices which it is within the power of the State to make."

But merely because illegitimacy may be relevant to intestate succession, where a state may have a compelling state interest in the stability of land titles, *Strahan v. Strahan, supra*, it does not also follow that the same rule applies with respect to serviceman's life insurance, for here the statute is a federal one concerned with an entirely different purpose than intestacy. The statutory purpose here was "to provide a substitute source of income for that lost by the insured's death", *Metropolitan Life Ins. Co. v. Thompson, supra*, and illegitimacy is irrelevant to that purpose.

This difference in statutory purpose also disposes of the basis relied upon in Labine to support the classification as applied to intestate succession, i.e., as being one designed to "establish, protect and strengthen family life . . ."[3] Here,

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[3]An often quoted exposition of the doctrine of "family unity" supporting distinctions based on illegitimacy is found in Davis, "Illegitimacy and the Social Structure," 45 Am. J. Sociology 215, 219 (1939), where it is said:

there is no evidence of any legislative judgment that Congress was concerned with such considerations. There is such a judgment as to intestate succession in Georgia.[4] Congress was concerned, however, with providing a substitute source of income for those likely dependent upon deceased servicemen, and under Georgia law, a father is legally obligated to support an illegitimate child, Ga. Code §74-202, and is guilty of the crime of abandonment upon failing to do so. Code §74-9902. By itself, this indicates that Georgia law does not consider "family unity" a compelling state interest, for if the father can be imprisoned for failing to support his illicit offspring, it goes without saying that the unity of the family would hardly be jeopardized more by permitting such children to share in insurance proceeds after his death.

Nor can it be plausibly maintained that there is a compelling state interest in discouraging promiscuity. To begin with, centuries of experience have demonstrated that such laws have utterly failed to accomplish this result. Krause, *supra* (65 Mich. L.R. at 492); Note, "Equal Protection and

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> "The gist of the theory is that the function of reproduction can be carried out in a socially useful manner only if it is performed in conformity with institutional patterns, because only by means of an institutional system can individuals be organized and taught to cooperate in the performance of this long-range function, and the function be integrated with other social functions. The reproductive or familial institutions constitute the social machinery in terms of which the creation of new members of society is supposed to take place. The birth of children that do not fit into this machinery must necessarily receive the disapproval of society, else the institutional system itself, which depends upon favorable attitudes in individuals, would not be approved or sustained."

[4]Ga. Code §113-904 declares: "Bastards have no inheritable blood, except that given to them by express law. They may inherit from their mother, and from each other, children of the same mother, in the same manner as if legitimate. Legitimate and illegitimate children of the same mother shall inherit alike the estate of the mother. If a bastard dies leaving no issue or widow, his mother, brothers, and sisters shall inherit his estate equally. In distributions under this law the children of a deceased bastard shall represent the deceased parent."

the Applicability of Levy v. Louisiana to Succession Law," 44 Tul. L.R. 640 (1970). One of every 16 persons is illegitimate, Krause, *supra*, and the rate of illegitimacy for both white and non-white persons in this country increased between 1963 and 1965, Gray & Rudovsky, *supra* (118 U. Pa. L.R. at 6). This same argument was rejected by the Court in *Glona v. American Guaranty & Liability Insurance Co.*, 391 U.S. 73, 75 (1968) where it was said: "Yet we see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would indeed be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." Moreover, this objective cannot be accomplished by punishing the child for the sins of the parents, and the state may not penalize one because of a status over which he has no control, *Robinson v. Louisiana*, 370 U.S. 660 (1962), anymore than it can discriminate against one because of the color of his skin—a status over which he equally has no control. Gray & Rudovsky, *supra*, 118 U. Pa. L.R. at P. 6. And, as held by the Court in *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964): "It is a familiar and basic principle, recently reaffirmed in NAACP v. Alabama, 377 U.S. 288, 307, 12 L.Ed. 2d 325, 338, 84 S. Ct. 1302, that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"

A compelling state interest is not served by the classification on the reasoning that difficult questions of proof would be presented, and fraudulent claims encouraged.[5] This same argument was rejected by this Court in *Glona*,

[5]Georgia law contains an in rem type procedure under which all claimants can be required to come in and assert their interest to assets in administration, after which, "all parties interested in said assets shall be forever barred from intervening in the case." Code §37-410.

391 U.S. at 76, and much of what has been said above with respect to discouraging promiscuity also applies here.

In most instances, the truth is that discrimination against illegitimates is based neither on any rational basis or any compelling state interest, but upon prejudice—the influence of the church and the fact that in its formative stages all laws were made by men desirous of limiting the claims of their illegitimate children. Krause, *supra*, 65 Mich. L.R. at 498-9, or what one writer has characterized as "[S]ociety's distaste for the parents' activity." Note, "Inheritance Rights of Illegitimate Children Under the Equal Protection Clause", 54 Mich. L.R. 1336, 1344 (1970).

It is submitted that in the present context, prejudice is no more valid to the state's objective than it was in *Brown v. Board of Education*, *supra* or in *Loving v. Virginia*, *supra*.

IV. DISCRIMINATION AGAINST ILLEGITIMATES FALLS MORE HEAVILY UPON NEGROES, AND IS UNCONSTITUTIONAL FOR THIS ADDITIONAL REASON.

Of the 2 1/2 million illegitimate surviving children born between 1940 and 1957 in the United States, 1 1/2 million were non-white, and only 1 million were white. (Krause, *supra*). Between 1963 and 1965, the rate for illegitimate births for non-whites increased from 235.9 per thousand births to 263.2 per thousand. Gray & Rudovsky, *supra* (118 U. Pa. L.R. at p. 6).

Statistics placed in evidence below indicate that in 1963, 24% of all non-white births in the nation were illegitimate (A. 30). In 1957, there were 8,872 non-white, as against 1,036 white, illegitimate births in Georgia (A. 35). In 1880, only one-third of all Negro children were born in wedlock in the United States (A. 32).

Petitioner here who is a Negro (A. 55), submitted in support of his motion for summary judgment the affidavits of two professors of family relations and psychology at the University of Georgia (A. 27, 31). These deponents declare

that the illegitimacy rate is much greater for Negroes than for whites, due to economic deprivation, discrimination, and the residual effects of the institution of slavery. Slaves were bred like animals, marriage among them was discouraged, and was a temporary contract, vulnerable to the whims of their masters (A. 29, 32). In some communities, nearly half of the Negro population is illegitimate (A. 30). This case itself reflects that both petitioner and his mother were illegitimate (A. 80), and the father of deceased also fathered two illegitimate children (A. 75).

While these two affidavits were not accepted in evidence (A. 90), they nevertheless may be judicially noticed as "legislative" facts. *McCormick on Evidence, 705,* §329; *United States v. Carolene Products Co.,* 304 U.S. 144, 154 (1938).

Almost 50 years ago, a distinguished Negro educator born and reared in the same Georgia county as petitioner had occasion to write, concerning the plight of the Negro, that:

> "'Life, therefore, among the plantation slaves, excepting the house servant personnel, was maintained on a plane parallel to that of domestic animals. Slaves were bred for the market to meet the ever increasing demands of the Southwestern cotton belt. It is estimated that 80,000 slaves were sold annually from the upper slave states, Maryland, Virginia, North Carolina, Tennessee, Delaware, Kentucky, and Missouri. Slave women were valuable in proportion as they were able to breed children who could be sold or trained as plantation workmen." Brewer, "Some Effects of the Plantation System Upon The Ante-Bellum South," 11 Ga. Hist. Quarterly 250, 268 (1927).

Here, the classification would fall heaviest upon Negro children, whose disadvantaged position this Court has judicially noticed to be the result in part of past discrimination. *Gaston County v. United States,* 395 U.S. 285 (1969), and see *Calhoun v. Latimer,* 4 Race Rel. L.R. 576 (1959), where judicial notice was taken of the fact that the Atlanta public schools were segregated for many years, and see also

Hunt v. Arnold, 172 F. Supp. 847 (D.C. Ga. 1959), and Constitution of Georgia, 1945, Art. VIII, Sec. I, Par. I; Constitution of 1877, Art. VIII, Sec. I, Par. I, both requiring segregated schools. Although the classification be neutral on its face, it nevertheless cannot stand where it is discriminatory in operation because continuing the effects of past discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Classifications based upon race are constitutionally suspect, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), are subject to "the most rigid scrutiny", *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *Loving v. Virginia*, 388 U.S. 1, 11 (1967), and must be "carefully confined". *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966).

The effect of such a classification here would be to disentitle fully one-fourth of all Negro children to benefits under policies of insurance written under the Serviceman's Life Insurance Act and the Government Employees Insurance Act—at least where no beneficiary is designated by name.

It is interesting to note that at one time Georgia law expressly recognized the peculiar position of its Negro population with respect to illegitimacy, for an act of 1866 declared that "every colored child heretofore born is declared to be the legitimate child of his mother, and also of his colored father, if acknowledged by such father." See *White v. Ross*, 40 Ga. 339 (1869). It is respectfully submitted that the due process and equal protection clause compels the same recognition today, for the continuing effects of those conditions extant many years ago, still persist.

CONCLUSION

Over 120 years ago, the Supreme Court of Georgia, in upholding a legislative act legitimatizing two illegitimate children, declared:

> "There is a growing tendency everywhere, and especially in this country, to relax the ancient rigor of the law in respect to bastards, and to look to the Penal Code, and to the guilty parties for the prohibition and prevention of fornication and adultery, rather than visit the vengeance of the law upon the innocent heads of the unfortunate offspring." *Beall v. Beall*, 8 Ga. 210, 212 (1850).

In a matter purely of state concern, it may well be within the power of the Georgia Supreme Court, as the majority of that Court did here, to retrogress to the days of Blackstone when illegitimates were considered *filius nullius*, although as we have endeavored to show above, the Constitution of the United States precludes such blind adherence to the dead hand of the past in the present context. But aside from this, it is submitted that the Georgia Supreme Court should not be permitted to transplant its antediluvian and misplaced notions of morality into a federal statute and thereby elevate them to the level of national policy. The judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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